Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

The Commission should build upon the pro-competitive thrust of the First Report and Order by rejecting proposals that would hamper facilities-based competition and by adopting modifications that would help spur the expeditious transition to the competitive local telecommunications marketplace envisioned by Congress.

To that end, the Commission must decline proposals advanced by ILECs and utilities to narrow the scope and impact of the express right of access to poles, ducts, conduits and rights-of-way granted to competitors by the 1996 Act. In addition, the Commission must ensure that States seeking to regulate access to poles pursuant to their "reverse preemptive" authority, do so in full conformity with the broad right of access mandated by the Act.

Requests by State commissions to alter the Act's bar against the imposition of incumbent local exchange carrier (ILEC) obligations on new entrants are contrary to both the statutory requirements and sound public policy. The Commission should reaffirm that the Act broadly proscribes the imposition of ILEC duties on competitive local exchange carriers (CLECs), and make clear that it will act expeditiously to preempt States that persist in efforts to impose such requirements on CLECs.

The Commission should ensure that its transport and termination rules and policies promote Congress' goal of expediting competition. In that regard, the Act's language and policies necessitate revision of the transport and termination rate-setting formula to exclude consideration of forward-looking joint and common costs. In addition, the Commission should not require bill-and-keep States to measure traffic balance until at least one year after the implementation of full number portability. The Commission also should preserve and strengthen its policy of symmetric compensation, retain its rule requiring the immediate provision by ILECs

of interim transport and termination during the pendency of interconnection negotiations with CLECs, and clarify that States may not revise CLEC local calling scopes for purposes of setting reciprocal compensation rates.

The Commission should decline to impose "transmission at tariff" obligations on CLECs providing information services. Neither the Act nor sound public policy warrant the adoption of such obligations.

To ensure that the procedures for negotiating and implementing interconnection agreements are consistent with the Act's competitive purposes, the Commission should take several steps aimed at ensuring an equitable and efficient transition to competition. Performance standards and reporting requirements should be adopted to ensure that ILECs carry out their duties under Section 251(c) in full conformity with the Act's non-discrimination requirement. The switching interval prescribed in the First Report and Order for changing over customers who seek service from new entrants should be retained, while ILEC efforts to impose burdensome and unnecessary bona fide request requirements on CLECs seeking interconnection should be rejected. ILECs should be required to submit to State commissions and furnish to requesting carriers all pre-Act and post-Act interconnection agreements to which they are a party. Pre-act agreements between neighboring incumbents should be deemed approved to reduce administrative burdens on States and speed CLEC access to interconnection terms already determined by ILECs to be technically feasible.

Finally, the Commission also should revise its formula for setting wholesale discount rates available to resellers to conform to the Act's requirement that resale rates be established based upon costs that will be avoided by ILECs.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, hereby submits this reply to certain oppositions to petitions for reconsideration of the First Report and Order in the above-captioned proceeding.[1/]

I. THE COMMISSION SHOULD NOT RETREAT FROM THE ACT'S MANDATE FOR ACCESS BY COMPETITORS TO POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

A. Utility Proposals to Weaken Competitors' Access Rights Must Be Rejected

The Commission's pole attachment rules should reflect the pro-competitive purposes of the 1996 Act. To that end, the Commission must not waver from its determination that a utility that uses any of its facilities for wire communications subjects all of its poles, ducts, conduits, and rights-of-way to the Commission's attachment rules.[2/] As Continental Cablevision and other commenters point out, the efforts by utilities to exempt themselves from the amended Pole Attachment Act under a "pole-by-pole" theory would undermine the jurisdictional premise of the

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[1/] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("First Report and Order"), 61 Fed. Reg. 45,476 (Aug. 29, 1996).

[2/] See First Report and Order at ¶¶ 1173, 1185; NCTA Opposition at 33-34.

1978 Cable Act, not to mention the 1996 Act.[3/] Any rule adopting the pole-by-pole theory would allow utilities to dictate the design and architecture of their competitors' telecommunications networks and therefore should be rejected.

The ability of utilities -- and particularly ILECs -- to reserve attachment space for future use should be limited to curb abusive behavior. Continental Cablevision correctly describes the threat that both electric utilities and ILECs will attempt to monopolize attachment space in order to gain a competitive advantage over other telecommunications carriers.[4/] Neither electric utilities nor ILECs should be permitted to make blanket reservations of space. Attaching parties must be allowed to occupy all available space until the owner demonstrates need, in order to prevent warehousing aimed at stifling competition.[5/]

NCTA agrees with the Association for Local Telecommunications Services (ALTS) that the absence of space on an existing pole, conduit, or right-of-way is not a sufficient reason to deny an attaching party access.[6/] Otherwise, utilities and ILECs could selectively expand pole capacity only when needed to serve their own immediate needs, leaving competitors with no room to attach. For the same reason, utilities should be required to exercise their eminent domain powers or take other steps necessary to expand available capacity at the request of attaching parties. As NCTA explained in its Opposition to Petitions for Reconsideration, failure

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3/ Continental Cablevision, et al., Opposition at 5-6.

4/ Id. at 6-8, 11-12.

5/ Some ILECs argue that they should be placed on the same footing as other utilities for purposes of reserve space. See, e.g., BellSouth Opposition at 9-10. The temptation to warehouse space solely to exclude competitors is obvious, and this proposal should therefore be rejected. See NCTA Opposition at 27-29.

6/ ALTS Opposition at 27-28.

to require the exercise of this authority is tantamount to freezing the amount of attachment space at existing levels.[7/]

The rules established by the Commission should not be altered to allow utilities to drive up the costs of attaching parties or narrow the access rights granted to competitors by the Act.[8/] As demonstrated in the oppositions filed by NCTA and Continental Cablevision, et al., the utilities must not be allowed to circumvent the intent of the amended Pole Attachment Act by riddling the rules with loopholes.

B. The Commission Has The Power To Require Access Certification by States

A number of utilities and ILECs argue that the Commission does not have the authority to require States seeking to regulate pole attachments to certify that they guarantee a right of access to poles.[9/] They contend that because Section 224(c)(1) specifies "access" as one of the pole attachment "matters" that the States are empowered to regulate through reverse preemption, the absence of a specific reference to "access" in Section 224(c)(2)'s certification requirement implies that the Commission may not adopt access certification rules.[10/] The cramped reading of Section 224 urged by the utilities is both unwarranted by the plain language of the statute and contrary to the goals of the 1996 Act. While Section 224(c)(2) sets a minimum certification baseline, it does not preclude the Commission from adopting additional certification rules. An administrative agency may adopt rules necessary to carry out its statutory mandate, even when

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7/ NCTA Opposition at 26-27; Continental Cablevision Opposition at 18-19.

8/ See generally Continental Cablevision, et al., Opposition at 3-19.

9/ American Electric Power Service Corp., Commonwealth Edison, Duke Power, Entergy Services, Northern States Power, and The Southern Company ("Infrastructure Owners") Opposition at 4-9; BellSouth Opposition at 10-11.

10/ Id. at 5-6.

those rules are not specifically authorized.[11/] As demonstrated in NCTA's Petition for Reconsideration,[12/] access certification subject to Commission review is a necessary and appropriate mechanism for ensuring that a State's regulation of access fulfills the objectives of the 1996 Act.

Contrary to BellSouth's assertion, NCTA is not seeking, through its certification proposal, to "advocate[] a presumption that [S]tates are not adequately regulating access to poles."[13/] Rather, because States are only permitted to regulate access in accordance with the Federal access provision established in Section 224(f),[14/] certification review by the Commission represents a reasonable means of ensuring State conformity with the broad access mandate prescribed in the Act.[15/]

11/ See e.g., Zarr v. Barlow, 800 F.2d 1484, 1486 (9th Cir. 1986); Alexander v. Trustees of Boston University, 766 F.2d 630, 636-37 (1st Cir. 1985). See also California Cable Television Association Opposition (CCTA) at 5-6 (arguing that Commission could adopt rules requiring access certification with specific assurance that State meets minimum standards set at Federal level).

12/ NCTA Petition for Reconsideration at 20-24.

13/ BellSouth Opposition at 10. BellSouth also errs by suggesting that it will be easy for parties to ascertain whether a State has properly exercised its preemptive authority over access regulation. Compare id. and NCTA Opposition to Petition for Reconsideration at 22-23. For example, Edison Electric Institute's (EEI) suggestion that States may regulate access so long as their rules do not constitute a discriminatory barrier to entry, EEI/UTC Opposition at 8, is not consistent with the affirmative mandate for access in Section 224(f).

14/ 47 U.S.C. § 224(c)(1) (Federal authority over access is preempted only where State regulates such matters "as provided in subsection (f)").

15/ NCTA Opposition at 32; CCTA Opposition at 1-4 (State access rules must meet minimum Federal standards). NCTA fully concurs with CCTA's argument that State certification regarding regulation of pole rates in no way determines whether a State is authorized to regulate pole access. Id. at 3. Thus, regardless of whether the Commission adopts the specific access certification procedures proposed herein, it is clear that the 1996 Act does not "bar recourse to federal access standards in states which only regulate rates," id., and that "[s]tate access laws which fail to meet federal minima cannot trump federal law." Id. at 4.

II. THE ACT BARS THE IMPOSITION OF ILEC REQUIREMENTS ON CLECs

In the First Report and Order, the Commission correctly interpreted the express language and legislative history of the 1996 Act to prohibit burdening CLECs with the ILEC obligations contained in Section 251(c).[16/] The Public Utilities Commission of Ohio (PUCO) and Texas Public Service Commission (Texas PSC) sought reconsideration of this determination,[17/] notwithstanding the Act's clear bar against saddling new entrants with obligations that are only appropriate for carriers with market power.[18/] As MCI, Sprint, AT&T and Time Warner all point out, the efforts by the PUCO and Texas PSC are directly contrary to the Act's language and purposes, and therefore must be rejected.[19/] Moreover, such efforts demonstrate the need for the Commission to make clear that it will act swiftly to preempt any attempt by States to impose ILEC requirements on CLECs.

III. TRANSPORT AND TERMINATION ISSUES

A. The Act Does Not Permit Forward-Looking Joint and Common Costs to be Included in the Rates for Transport and Termination

Several CLECs support NCTA's argument that the "additional costs" standard prescribed by Congress for transport and termination rates bars the inclusion of joint and common costs in the formula used to set those rates.[20/] As these parties point out, Congress clearly established a distinct rate-setting formula for transport and termination in Section 252(d)(2) that precludes

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16/ See First Report and Order ¶¶ 1247-48.

17/ PUCO Petition at 3-5; Texas PSC Petition at 13-17.

18/ See NCTA Opposition at 5-8.

19/ See Sprint Opposition at 23-24; MCI Response at 42-44; AT&T Opposition at 44; Time Warner Opposition at 3-6.

20/ ALTS Reply at 10-11; US One Comments at 8-10; TCG Comments and Opposition at 3-4; Comcast/Vanguard Comments at 17-18.

the Commission from utilizing the same methodology used to establish rates for unbundled elements.[21] US One notes that Congress established a "marginal cost" standard in recognition that "transport and termination volume does not affect the receiving carrier's fixed costs or its joint and common costs," so that such costs may be appropriately excluded from the rates paid by originating carriers.[22] In addition, sound policy reasons favor the use of an incremental cost rate for transport and termination in order to minimize barriers to entry by new competitors.[23]

ILEC arguments supporting retention of the transport and termination rate-setting standard established in the First Report and Order are unavailing.[24] Pacific Telesis asserts -- but does not demonstrate -- that "shared and common costs are legitimate additional costs incurred in providing transport and termination,"[25] but it cannot reconcile this assertion with the economic reasoning employed in the First Report and Order, which holds that shared and common costs cannot be additional costs because they would be incurred regardless of whether

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[21] See TCG Comments at 4; ALTS Reply at 10-11.

[22] US One Comments at 9.

[23] See ALTS Reply at 11 (noting that "transport and termination is the ultimate bottleneck for new entrants"); US One Comments at 9 ("Transport and termination services are necessary for subscribers on a CLEC network to reach ILEC subscribers, and vice versa, and serve a very different purpose than interconnection and the provision of unbundled elements"); Comcast/Vanguard Comments at 18.

[24] BellSouth contends that the stay of the Commission's pricing rules imposed by the Eighth Circuit Court of Appeals militates against any further refinements of those rules. See e.g., BellSouth Opposition at 2-3. The Eighth Circuit's stay does not, however, constitute a resolution on the merits of the validity of the pricing rules. Moreover, the fundamental disparity in bargaining power between ILECs and CLECs upon which those rules are predicated is still present. Cf. First Report and Order at ¶¶ 55, 141. Since the lawfulness of the rules is still very much a pending issue, the Act's goal of expediting local competition is best served by using the Reconsideration process to effectuate any modifications of the pricing rules deemed necessary by the Commission.

[25] Pacific Telesis Opposition at 21. See also GTE Opposition at 24 ("'additional cost' methodology allows carriers to recover a reasonable allocation of shared costs").

or not the ILEC provides transport and termination.[26/] Pacific Telesis also states that the exclusion of non-traffic sensitive costs "accommodate[s]" the statutory standard of additional costs.[27/] The Act obligates the Commission to implement -- not accommodate -- the additional cost standard, and that mandate cannot be fulfilled by excluding some (i.e., non-traffic sensitive) but not all (i.e., joint and common) additional costs from the transport and termination rate-setting formula. Indeed, common costs are non-traffic sensitive since they will be incurred even if the volume of terminating traffic originated by a competing carrier is fully curtailed.[28/]

B. ILECs Should Not Be Permitted to Delay the Immediate Provision of Transport and Termination During the Pendency of Interconnection Negotiations

CLECs join NCTA in opposing the Local Exchange Carrier Coalition's (LECC) effort to delay the immediate provision of transport and termination during the pendency of interconnection negotiations. The Commission adopted this requirement to enable facilities-based new entrants "without existing interconnection agreements to enter the market expeditiously."[29/] LECC's assertion that interim transport and termination cannot be provided to negotiating carriers until resolution of several "non-rate" items is, as MCI states, a "red herring" designed to delay the onset of competition.[30/] NCTA agrees with ALTS that certain items, such as 911/E911 calls and operator services, must necessarily be encompassed within the interim rule

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26/ NCTA Petition for Reconsideration at 12-13 (citing First Report and Order at ¶ 676).

27/ Pacific Telesis Opposition at 21.

28/ NCTA Petition at 14.

29/ First Report and Order at ¶ 1065.

30/ MCI Response at 31.

established by the Commission in order for it to be meaningful.[31/] ILECs should not be permitted to defeat the purpose of the interim requirement established by the Commission by engaging in protracted negotiations over "non-rate" items that will be resolved in the interconnection agreement itself. Accordingly, the Commission should retain Section 51.715 of its rules, and make clear that the requirement of immediacy precludes ILECs from using "non-rate" items to delay the expeditious provision of interim transport and termination.

C. Traffic Exchange Should Not Be Measured Until One Year Following the Deployment of Full Number Portability

In its Petition for Reconsideration, NCTA asked the Commission to revise its determination that State-ordered bill and keep arrangements must be terminated within six months of CLEC commencement of service if traffic is not in balance.[32/] CLEC traffic should not be measured until there has been an opportunity for traffic exchange under fair competitive conditions, which include the implementation of full number portability.[33/] Given the Act's explicit endorsement of bill and keep,[34/] the Commission should not adopt rules that would erode such arrangements absent a clear demonstration of traffic imbalance under fair competitive conditions. Such a demonstration cannot be made absent the implementation of full number portability.[35/] Accordingly, the Commission should require the States to defer traffic balance

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31/ ALTS Reply at 15.

32/ NCTA Petition at 5-7.

33/ TCG Comments at 5; ALTS Reply at 13. See also NCTA Petition at 6.

34/ 47 U.S.C. § 252(d)(2)(B)(i).

35/ See In the Matter of Telephone Number Portability, First Report and Order, CC Docket No. 95-1160 (rel. July 2, 1996) at ¶ 28 (number portability is "essential to meaningful [local] competition").

measurement for the purposes of determining whether to retain bill and keep until at least one year after implementation of full number portability.[36/]

D. The Commission Should Not Abandon the Principle of Symmetric Compensation for Transport and Termination Rates

Some ILECs have urged the Commission to retreat from its requirement that transport and termination rates paid and received by CLECs be set pursuant to the principle of symmetric compensation.[37/] Symmetric compensation ensures parity with respect to transport and termination rates, while freeing CLECs to utilize network topologies that differ in form, but not function, from those used by ILECs.

Advances in switching capabilities and network technologies permit CLECs to combine tandem, transport and end office functions through a single switch and associated distribution facilities in order to serve a geographic area comparable to that served by an ILEC tandem.[38/] Under the principle of symmetric compensation, CLECs should be entitled to receive tandem-based rates for transporting and terminating ILEC-originated traffic whenever their switches perform tandem-like functions or serve comparable geographic areas.[39/] As TCG points out, "A distinction should not be made between the CLEC tandem that provides both the tandem and end office function and the incumbent LEC's separate tandem and end office, just because the

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[36/] TCG Comments at 5; ALTS Reply at 13.

[37/] Ameritech Opposition at 30-32; Sprint Opposition at 21-22.

[38/] See e.g. MCI Response at 33; TCG Comments at 6-7; AT&T Opposition at 24.

[39/] See TCG Comments at 5-7; MCI Response at 32-34; MFS Response at 8-9; ALTS Reply at 12-13; Sprint Spectrum Opposition at 4-6; Cox Opposition and Response at 3-4.

incumbent LEC may have to employ both facilities to complete a call, while the CLEC employs more efficient technologies."[40/]

ILEC arguments in favor of weakening the principle of symmetric compensation lack merit. Ameritech contends that symmetric compensation would provide CLECs with "a double payment" unless it is limited to instances in which CLEC networks mirror the tandem/end office hierarchy employed by ILEC networks.[41/] Under Ameritech's view, transport and termination rates should be based upon the number of switches utilized, rather than on whether ILECs and CLECs are providing an equivalent service.[42/] The proposals advanced by Ameritech, LECC and Sprint should be rejected because they would "require new entrants to mimic the inefficiencies of ILEC networks . . . or to endure unbalanced, anticompetitive compensation arrangements for transport and termination."[43/]

E. CLECs' Local Calling Scopes Should be Used to Determine the Applicability of Transport and Termination Rates

In its Petition for Reconsideration, NCTA sought revision of the Commission's decision to grant State commissions the authority to determine "local" geographic areas for purposes of applying either transport and termination rates or access charges.[44/] States that decide to utilize ILEC local calling areas would undermine the efficacy and cost-effectiveness of alternative local

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[40/] TCG Comments at 7.

[41/] Ameritech Opposition at 30. See also Sprint Opposition at 21-22; LECC Petition for Reconsideration at 14. As US One points out, the unfairness of this proposal is exacerbated by the fact that some ILECs have barred CLECs from deploying end office switches or switch remotes in collocation cages stationed at the end of unbundled local loops. US One Comments at 10-12. Thus, the Ameritech proposal, combined with the ILEC practices described by US One, would fully defeat the Commission's attempt to establish symmetric compensation.

[42/] See TCG Comments at 7.

[43/] Cox Opposition and Response at 3.

[44/] NCTA Reply Comments at 18; NCTA Petition at 24-25.

calling scopes established by new entrants by forcing them to pay exchange access rates for the transport and termination of traffic CLECs properly deem local.[45/]

The arguments supporting State definition of local calling scopes are expressed in largely conclusory fashion, without providing any substantial basis for upholding a scheme that inarguably works to the advantage of entrenched incumbents.[46/] Indeed, Sprint concedes that NCTA's proposal is rooted in "valid concerns" regarding the likelihood that States will not adhere to CLEC local calling scopes, but suggests that unspecified other remedies are available to address those concerns.[47/] Pacific Telesis claims that a CLEC that establishes "extremely large" local calling areas could "hand off a call to the ILEC far from the point of termination" and thereby force the ILEC to incur costs "that would not be recovered through averaged reciprocal compensation rates."[48/] This claim does not withstand scrutiny. The Commission's scheme for establishing transport and termination rates ensures that if CLECs hand off calls far from the point of termination, the ILEC will be compensated for any additional transport costs it incurs.

IV. TRANSMISSION AT TARIFF OBLIGATIONS SHOULD NOT BE IMPOSED UPON CLECs PROVIDING INFORMATION SERVICES

In its Petition for Reconsideration, the Information Technology Association of America (ITAA) proposed that CLECs should be required to obtain the transmission capacity underlying their information services offerings at the same rates, terms and conditions as that capacity is

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45/ See ALTS Reply at 14; see also Cox Petition for Reconsideration at 10.

46/ See, e.g., ALTS Reply at 14; Pacific Telesis Opposition at 33-34.

47/ Sprint Opposition at 20-21.

48/ Pacific Telesis Opposition at 34. Pacific also asserts that in such instances CLECs could thereby avoid access charges even though the ILEC would incur substantial access costs. Id.

made available to all other information services providers ("ISPs").[49/] As shown in NCTA's Opposition, neither the Act nor sound policy considerations warrant imposing "transmission at tariff" obligations on CLECs that provide information services.[50/]

Both MFS and ALTS correctly note that nothing in the 1996 Act implicates the concerns raised by ITAA, which is reason enough to reject the proposal in this proceeding.[51/] In addition, because CLECs lack market power, the "price squeeze" concerns animating the imposition of "transmission at tariff" obligations are absent in this instance.[52/] Indeed, any attempt by a facilities-based new entrant to discriminate against ISPs would backfire because the CLEC would "los[e] a potential customer for its transmission services [to the ILEC] without having gained any real advantage in the information services market."[53/] Because the ITAA proposal seeks to impose unnecessary and counterproductive regulations on new entrants that could otherwise provide ISPs with a choice of carriers for transmission capacity, it should be rejected.[54/]

V. THE COMMISSION SHOULD ADOPT PERFORMANCE STANDARDS AND REPORTING REQUIREMENTS TO ENSURE ILEC COMPLIANCE WITH THE ACT'S CORE PRO-COMPETITION PROVISIONS

As urged by TCG, NCTA and others, the Commission should reconsider its decision not to impose specific performance standards on ILECs and ensure compliance through reporting

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49/ ITAA Petition at 6.

50/ NCTA Opposition at 24-25.

51/ MFS Response at 1-2; ALTS Reply at 9.

52/ ALTS Reply at 9.

53/ MFS Response at 3.

54/ See id.

requirements.[55/] These provisions are necessary to ensure that competition from CLECs is not hampered by inferior service quality and unreasonable delays by ILECs in connection with the provision of interconnection, unbundled elements and other services and duties required under Section 251(c).[56/]

Several ILECs and the United States Telephone Association oppose performance standards and reporting requirements. They generally argue either that such requirements would be unduly burdensome or that the States are best suited to determine any standards and whatever reporting is necessary to determine compliance.[57/] As noted by MCI, however, a reporting requirement would not impose any significant additional burdens on ILECs because much of the information they would be required to provide is already furnished in conjunction with the ARMIS 43-05 service quality reports.[58/] In addition, as Sprint notes: "ILECs who are not involved in discriminatory conduct may well find that the burden of submitting this information is more than offset by averting claims, based on incomplete information, that the carrier is involved in discrimination."[59/]

The Commission has recognized that, absent the Act's imperatives, ILECs "have strong incentives" to resist their interconnection and unbundling obligations.[60/] It is disingenuous, therefore, to suppose that CLECs could bargain for and obtain meaningful performance standards

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[55/] See TCG Petition at 52; NCTA Opposition at 14-15; ALTS Reply at 31-32; MCI Response at 16-18; Sprint Opposition at 1-2; WorldCom Comments at 6-7; see also WorldCom Petition at 9.

[56/] See NCTA Opposition at 14.

[57/] Ameritech Opposition at 15-17; Bell Atlantic Opposition at 16-17; BellSouth Opposition at 8; NYNEX Comments at 21; United States Telephone Association Opposition at 28-30.

[58/] MCI Response at 17.

[59/] Sprint Opposition at 2.

[60/] First Report and Order at ¶ 55.

in negotiations with ILECs,[61] given the disparity in bargaining power acknowledged by the Commission.[62] Moreover, while the ILECs contend that States are best equipped to deal with these matters, national performance standards and reporting requirements are consistent with the "pro-competitive . . . national policy framework" established by the Act, since they would ensure that new entrants competing on a multistate basis will not face significant variances with respect to their ability to obtain the threshold services and elements Congress deemed necessary to foster local competition.[63]

VI. THE COMMISSION SHOULD REJECT ILEC PROPOSALS TO IMPOSE BONA FIDE REQUEST REQUIREMENTS ON PARTIES SEEKING INTERCONNECTION

Recognizing both the ILECs' incentive to preserve market power and their lack of any offsetting economic incentive to reach agreement with new entrants,[64] the Commission declined to allow ILECs to impose unnecessary negotiation requirements on new entrants.[65] Despite the Commission's view, LECC persists in arguing that ILECs need the protection of certain "bona fide request" requirements imposed on CLECs in their negotiations for interconnection and access to unbundled elements.[66]

LECC asks the Commission to allow ILECs to require that CLECs commit to take a certain volume of service, commit to take service for a certain period of time, provide demand

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61/ See e.g. Ameritech Opposition at 16-17.

62/ First Report and Order at ¶ 141.

63/ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 1.

64/ See First Report and Order at ¶¶ 55, 141.

65/ Id. at ¶ 156.

66/ LECC Petition at 19.

forecasts for "services to be interconnected," and accept "termination liability" provisions in agreements with ILECs.[67] NCTA and others have argued that these proposed provisions are unnecessary, anticompetitive, without support in the record in this proceeding, and without support in the 1996 Act.[68] For example, as AT&T points out, the "termination liability" proposal offered by LECC would apply only to agreements sought by new entrants, do nothing to deter so-called "frivolous interconnection requests," and impose additional and unnecessary burdens on CLECs seeking to compete with ILECs.[69] Accordingly, the Commission should promote fair negotiations and parity in bargaining power by declining to adopt the proposals proffered by LECC and SNET.

VII. THE COMMISSION SHOULD NOT REVISE THE CUSTOMER SWITCHING INTERVAL ADOPTED IN THE FIRST REPORT AND ORDER

In furtherance of the Act's goal of expeditious competition, the Commission has required ILECs to "switch over customers for local service in the same interval as LECs currently switch end users" between presubscribed interexchange carriers (PICs).[70] This timetable applies only where the change may be accomplished merely through software changes as opposed to physical modifications to the ILEC's network.[71]

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[67] Id. at 19. See also SNET Comments at 12 (supporting imposition of volume and term commitments).

[68] See NCTA Opposition at 8-12; AT&T Opposition at 15-16; ALTS Reply at 33-34; MCI Response at 8-9.

[69] AT&T Opposition at 16.

[70] First Report and Order ¶ 421.

[71] Id.

LECC has asked the Commission to adopt a longer switching interval.[72] As MCI points out, however, LECC has not shown or even alleged "that it would always be technically infeasible to change over local service" within the timetable prescribed for PIC changes.[73] While NYNEX alleges that the software switch may be more complex, it likewise does not suggest how this complexity adds any time to the process for switching over a customer.[74] Thus, LECC and NYNEX have provided no basis for the Commission to revisit its prior determination to apply the PIC change switching interval to customers who choose to switch local carriers.[75]

VIII. STATE APPROVAL OF PRE-ACT AGREEMENTS BETWEEN INCUMBENT CARRIERS IS UNNECESSARY

NCTA and several commenters have urged the Commission to clarify that ILECs engaged in interconnection negotiations must provide all interconnection agreements (including pre-Act agreements) to CLECs with which they are negotiating.[76] While NCTA agrees that pre-Act agreements between incumbents and competitors require State review and approval to ensure

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[72] LECC proposes that an ILEC be allowed the same amount of time it takes to process its own local service orders. LECC Petition at 24.

[73] MCI Response at 19.

[74] See NYNEX Comments at 7-9. In commenting on a different proposal by Consolidated Communications Telecom Services, Inc., Ameritech argues that the interval for all switchovers, whether involving hardware or software changes, should be left to the parties or states. See Ameritech Opposition at 4-6. Ameritech was mainly concerned with hardware changes and did not address the Commission's rule regarding software-only changes. See id.

[75] See MCI Opposition at 19-20; NCTA Opposition at 12-13.

[76] See ALTS Petition at 9-10; Wisconsin PSC Petition at 5; NCTA Opposition at 13; Arch Comments at 4-5; ALTS Reply at 30-31; TCG Comments at 14. Several commenters also expressed support for the Commission's decision to require filing of pre-Act agreements, without commenting on proposals to require ILECs to make those agreements available in negotiations. See CompTel Comments at 9-10; MCI Response at 6-8.

conformity with the Act's goals and purposes,[77] pre-Act interconnection agreements between incumbents do not require such approval.[78] Indeed, the Act's purposes are more effectively advanced by deeming approved pre-Act agreements between incumbents.[79]

Agreements between ILECs resulted from negotiations by carriers of roughly equal size and bargaining power that were making arrangements for their mutual benefit without the threat of invading each other's markets. Because this class of agreements can be presumed to contain commercially reasonable and technologically feasible terms, and to have been negotiated in good faith, the Commission should deem them "approved" without resort to the State approval process of Section 252(e)(1).[80] There is no reason to delay access by CLECs to the terms and conditions contained in pre-Act ILEC-to-ILEC interconnection agreements.[81] It is also important, as the Commission has recognized, not to unnecessarily burden State commissions with review of a large number of preexisting agreements.[82]

IX. THE COMMISSION MUST REVISE THE STANDARD FOR CALCULATING THE WHOLESALE DISCOUNT RATE MADE AVAILABLE TO RESELLERS OF ILEC TELECOMMUNICATIONS SERVICES

In Petitions for Reconsideration, NCTA argued that the resale discount costing methodology and default wholesale rates established by the Commission must be revised to

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77/ CompTel Comments at 10; MCI Response at 6-8.

78/ Of course, all interconnection agreements, including those entered into between neighboring incumbents prior to passage of the Act, must be filed with State commissions. 47 U.S.C. § 252(a)(1).

79/ NCTA Opposition at 13.

80/ Post-Act interconnection agreements between incumbents must be subject to State review and approval to assure conformity with the Act's non-discrimination and public interest standards. See 47 U.S.C. § 252(e)(2).

81/ 47 U.S.C. § 252(i).

82/ First Report and Order ¶ 171.

conform to the "avoided cost" standard set forth in the 1996 Act.[83/] As both NCTA and Time Warner pointed out, the First Report and Order converted the statutorily-prescribed "avoided cost" standard based upon costs actually avoided by ILECs providing service at wholesale into a "reasonably avoidable" standard based upon theoretical projections of the costs that should be avoided by ILECs when offering service at wholesale.[84/] Several ILECs agree that the Commission has fundamentally misapplied the resale costing standard set forth in the Act, resulting in an excessively high wholesale discount.[85/]

WorldCom and MCI support the "reasonably avoidable" standard utilized in the First Report and Order, arguing that use of an "avoided cost" standard based upon expenditures actually shed by ILECs would undercut competition from resellers by inflating wholesale prices.[86/] They also argue, along with AT&T, that a "reasonably avoidable" cost standard is necessary to prevent ILECs from shrinking the wholesale discount by deliberately declining to avoid costs.[87/] These arguments, however, reflect precisely the type of outcome-oriented

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[83/] NCTA Petition at 14-20. See also Time Warner Petition at 3-17.

[84/] NCTA Petition at 14-16; Time Warner Petition at 4-7.

[85/] See e.g. USTA Opposition at 11 and n.22; US West Comments at 8-9. See also Bell Atlantic Opposition at 7.

[86/] See WorldCom Comments at 22; MCI Response at 28.

[87/] WorldCom Comments at 22; MCI Response at 28; AT&T Opposition at 27-28. AT&T suggests that excluding from the wholesale discount calculations advertising costs that an ILEC does not avoid is tantamount to reseller subsidization of ILEC retail efforts. Id. at 28. Resellers cannot, however, be said to subsidize costs borne by ILECs that continue to be incurred irrespective of the fact that services are also available for purchase at wholesale.

approach that Congress expressly rejected when it established the "avoided cost" standard for calculating wholesale rates.[88/]

Some costs deemed "reasonably avoidable" by the Commission in the First Report and Order will continue to be incurred by ILECs, notwithstanding their provision of service on a wholesale basis.[89/] For instance, Pacific Telesis contends that the First Report and Order significantly overstates the extent to which product management, advertising, and common corporate costs will be avoided by ILECs.[90/] Indeed, none of the advocates arguing on behalf of a deep resale discount have reconciled the presumption that a portion of joint and common costs are avoided when ILECs provide service at wholesale with the Commission's statement that common costs continue to be incurred as long as an ILEC continues to perform any of the functions that trigger such costs.[91/] Accordingly, the wholesale discount costing methodology should be revised to reduce or eliminate the amount of product management, product advertising and indirect costs presumed to be avoided by ILECs.

[88/] See NCTA Petition at 14-15 and 19-20. WorldCom's suggestion that adherence to an "actually avoided" cost standard requires retroactive rulemaking is without merit. WorldCom Comments at 23. State commissions need not wait until wholesale services are actually offered in order to establish the proper discount. Instead, wholesale rates can be set based upon a State commission's evaluation of an ILEC's submission assessing the costs it avoids when providing service at wholesale.

[89/] NCTA Petition at 16-19. For example, NCTA challenged the presumption underlying the Commission's proxy rates that 90 percent of an ILEC's product management and product advertising costs are avoided, cf. AT&T Opposition at 28, n.42, and that indirect costs can be presumed to be avoided in proportion to the ratio of avoided direct costs to total costs.

[90/] Pacific Telesis Opposition at 18-19; see also US West Comments at 9-10. Indeed, Pacific Telesis' points out that "[e]ven using the legally suspect avoidable cost methodology set forth in ¶ 917 of the Commission's First Interconnection Order," yielded discount rates in California that are lower than the proxy ranges established in the First Report and Order. Pacific Telesis Opposition at 18.

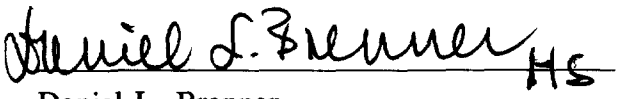
[91/] See First Report and Order at ¶ 676. Compare e.g. NCTA Petition at 18-19 with CompTel Comments at 6. Thus, the arguments offered on behalf of increasing the amount of indirect costs excluded from wholesale rates must be rejected. See e.g. AT&T Opposition at 30.

CONCLUSION

For the foregoing reasons, the Commission should reject the proposals for reconsideration opposed herein and in its opposition, and reconsider and revise the First Report and Order in accordance with the arguments set forth herein and in NCTA's initial Petition.

Respectfully submitted,

THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.



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